No. 10-241

IN THE
Supreme Court of the United States

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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1. The brief in opposition distorts, rather than defends, the decision below. According to the Government, the Fourth Circuit adopted a totality-of-the-circumstances approach to determining whether defense counsel provides the "Assistance" guaranteed by the Sixth Amendment in making a tactical decision regarding the conduct of a criminal trial over the defendant's objection. In particular, the Government contends that the Fourth Circuit "merely held that, where counsel makes a tactical decision regarding the conduct of a trial (here, declining an offer of a mistrial), he is not ineffective per se because the defendant expressed a wish to pursue a different course." Opp. 12. Under this approach, the Government asserts, the Sixth Amendment inquiry "could properly take account of, but would not be limited to, the fact that counsel overrode his client's wishes in making a tactical decision." *Id.*

That is not what the Government argued below, and not what the Fourth Circuit held. To the contrary, the Fourth Circuit "agree[d] with the government" that tactical decisions at trial "belong[] to the attorney," and that a defendant's disagreement with those decisions is "*simply irrelevant*." Pet. App. 4a (emphasis added); *see also id.* at 8a ("[W]e believe that whether to seek or accept a mistrial is a matter left to the sound judgment of counsel, even if the client disagrees with counsel's decision."). Thus, while "[t]he reasonableness of the tactical decision actually made by counsel is of course subject to challenge," *id.* at 9a, a defendant's objection to that decision has no bearing on any such challenge. This is not the narrow, fact-intensive approach described by the

Government; rather, this is a "broad rule" that gives defense counsel *carte blanche* to override his client's objections. *Id.* at 12a (Michael, J., concurring in the judgment). If, as the Fourth Circuit held, defense counsel has "the *right* to make tactical decisions about the conduct of a criminal trial [even] if the client expresses disagreement with the attorney's decision," *id.* at 11a (emphasis added), it follows that a criminal defendant has no right to control his own defense.

2. The Government chides petitioner for "propos[ing] a bright-line rule" that defense counsel must abide by his client's instructions. Opp. 13. According to the Government, "[s]uch a per se rule would conflict with [the] case-by-case approach" to ineffective-assistance claims adopted by *Strickland v. Washington*, 466 U.S. 668 (1984). Opp. 13. That alleged "conflict" is illusory.

The issue here, after all, is whether counsel provides "Assistance" *at all* where he makes a tactical decision regarding the conduct of a criminal trial over the defendant's objection. That issue was not presented in *Strickland*, and does not require a totality-of-the-circumstances inquiry. The Sixth Amendment, by its terms, guarantees a criminal defendant the right to "the *Assistance* of Counsel for *his* defence." U.S. Const. amend. VI (emphasis added). Where counsel overrides the defendant's instructions, "the defense presented is not the defense guaranteed [the defendant] by the Constitution, for, in a very real sense, it is not *his* defense." *Faretta v. California*, 422 U.S. 806, 821 (1975) (emphasis added); *see also id.* at 820 ("[A]n assistant, however expert, is still an assistant.").

The Constitution itself, in other words, establishes the very "bright-line rule" that the Government now derides.

3. It is no answer to assert, as does the Government, that criminal defendants may exercise their Sixth Amendment rights unwisely. Those rights do not depend on whether a defendant "has any particular insight about the relative costs and benefits of a particular tactical choice." Opp. 13. As noted above, the Sixth Amendment "grants to the accused *personally* the right to make his defense." *Faretta*, 422 U.S. at 819 (emphasis added). Thus, even if a defendant's tactical decision is "ill-founded" and contrary to "his objective best interests," Opp. 13, it is still his decision to make. If, as the Fourth Circuit held, defense counsel has the "right" to make tactical decisions over the defendant's objection, Pet. App. 11a, counsel would be "not an assistant, but a master; and the right to make a defense [would be] stripped of the personal character upon which the [Sixth] Amendment insists," *Faretta*, 422 U.S. at 820 (footnote omitted). Indeed, this Court has specifically rejected the Government's paternalistic approach by holding that a criminal defendant has the "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether* ...." *Id.* at 816 (emphasis added).

The Government tries to distinguish *Faretta* on concededly "narrow" grounds. Opp. 14. According to the Government, *Faretta* stands only for the proposition that a defendant has the right to decline the assistance of counsel altogether and proceed *pro se*. *See id.* at 14-16. Under this view, a defendant represented by counsel necessarily surrenders the

right to control his defense, so that "he is guaranteed *either* [1] the effective assistance of counsel to whose reasonable professional judgment tactical decisions are committed, *or else* [2] the right to proceed pro se." *Id.* at 16 (emphasis added).

The Sixth Amendment, however, does not present a criminal defendant with such a Hobson's choice. It is certainly true that "'when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.'" *Id.* at 15 (quoting *Faretta*, 422 U.S. at 820). But that is true only insofar as the defendant does not affirmatively object to his counsel's tactical decisions. Where, as here, the defendant *does* affirmatively object to his counsel's tactical decisions, it is the defendant's decision, not counsel's decision, that must control. *See, e.g.*, *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1999); *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994); *State v. Ali*, 407 S.E.2d 183, 188-90 (N.C. 1991).

Contrary to the Government's suggestion, that does not mean "that a defendant may selectively elect to proceed with counsel at one moment, pro se the next moment, and again with counsel the next." Opp. 16. Petitioner is not proposing any such "'"hybrid" representation.'" *Id.* (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984)). Rather, a criminal defendant represented by counsel retains the right to conduct his own defense (which includes the right to make tactical decisions at trial), should he choose to exercise that right. If defense counsel believes that honoring that right would conflict with his own professional obligations, he may seek to

withdraw from the representation. But defense counsel may not simply override a defendant's express objection to a tactical decision, and then leave the defendant bound by the very decision to which he objected.

4. It follows that the Government begs the question presented here by insisting that defense counsel must have "'wide latitude ... in making tactical decisions.'" Opp. 11 (quoting *Strickland*, 466 U.S. at 688-89). Petitioner has no quarrel with that proposition in the abstract, but only to the extent that "'the wide range of reasonable professional assistance,'" Opp. 10 (quoting *Strickland*, 466 U.S. at 689) is deemed to encompass the situation in which counsel overrides his client's express instructions. To say that counsel "'has authority to manage most aspects of the defense without obtaining his client's *approval*,'" Opp. 11 (quoting *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (emphasis added; citing *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)), is not to say that counsel has authority to manage most aspects of the defense over his client's *objection*. The "wide latitude" typically enjoyed by defense counsel, after all, "can only be justified ... by the defendant's consent." *Faretta*, 422 U.S. at 820. To the extent that a defendant expressly withdraws such consent, counsel's otherwise "wide latitude" is narrowed accordingly.

It is telling that the Government offers no response whatsoever to Justice Scalia's observation that "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008)

(opinion concurring in the judgment). Nor does the Government offer any response to the many cases cited in the petition for the proposition that a criminal defendant ""is bound by his counsel's choice *in the absence of express objection.*"" Pet. 12 (quoting *Watkins v. Kassulke*, 90 F.3d 138, 142-43 (6th Cir. 1996) (emphasis added in petition; in turn quoting *Armstrong v. United States*, 367 F.2d 821, 821 (7th Cir. 1966)); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999); *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980); *cf. Gonzalez*, 553 U.S. at 246. Needless to say, these cases would make little sense if, as the Fourth Circuit held below and the Government now reaffirms, criminal defendants are bound by their counsel's tactical decisions *even where*, as here, they expressly objected to those decisions.

5. The Government asserts that *Brown*, *Ali*, and *Zagorski*, in which the Supreme Courts of North Carolina and Tennessee, respectively, recognized a defendant's Sixth Amendment right to override his counsel's tactical decisions, "are consistent with the decision below." Opp. 16. That assertion is incorrect.

In each of those cases, a criminal defendant sought relief from a tactical decision that he was allowed to make over his counsel's objection. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. In sharp contrast to the decision below, both Supreme Courts held that criminal defendants have a federal constitutional right under *Faretta* to make such decisions, and are thus bound by them. "[W]hen counsel and a fully informed criminal defendant

client reach an absolute impasse as to ... tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 407 S.E.2d at 189 (internal quotation omitted); *see also id.* ("The attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred.") (internal quotation omitted); *Brown*, 451 S.E.2d at 186-87 (same); *Zagorski*, 983 S.W.2d at 658 ("Ultimately, ... the right to a defense belongs to the defendant."); *id.* at 658-59 ("When a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision.").

The difference between those cases and this one is purely procedural: the trial courts in those cases allowed the *defendants* to override their counsel, whereas the trial court here allowed *counsel* to override the defendant. Accordingly, even though the North Carolina and Tennessee Supreme Courts announced a rule of federal constitutional law diametrically at odds with the decision below, the defendants lost in all cases—the defendants lost in the state cases because they had in fact exercised their Sixth Amendment right to override counsel, whereas petitioner lost below on the ground that he had no such right in the first place. *Cf. State v. Freeman*, 690 S.E.2d 17, 21-22 (N.C. Ct. App. 2010) (holding, based on *Ali*, that a defendant was entitled to a new trial where the trial court erroneously allowed counsel to override the defendant on a tactical decision at trial). As explained in the petition, the upshot is the anomalous situation that a criminal defendant in state court in North Carolina

has a federal constitutional right to override his counsel on tactical decisions, whereas a criminal defendant in federal court in North Carolina has no such right. *See* Pet. 14-15.

The Government acknowledges in a footnote that "[t]he decisions in *Brown*, *Ali*, and *Zagorski* each contain broad language indicating that it is ultimately the defendant's wishes, rather than counsel's professional judgment, that should govern in the event of a disagreement." Opp. 18 n.3. The Government asserts, however, that this language "is *primarily focused* upon a determination of the ethical duties of counsel under the applicable ethical rules." *Id.* (emphasis added). That assertion is baseless. Each decision addresses the point in the context of a discussion of the defendant's federal rights under the Sixth Amendment. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. And even if there were any ambiguity on this score, this Court will deem a state court's decision to be based on federal law unless the court "indicates clearly and expressly" that the decision is based only on state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). There is no such indication in any of the state-court decisions at issue here.

6. Finally, the Government argues that "[e]ven if there were a conflict, this case would be a poor vehicle for resolving it, for two reasons." Opp. 19. This argument too is unavailing.

The Government first argues that "it is not at all clear" that defense counsel here in fact disregarded petitioner's instructions, as the record contains conflicting evidence on this point. *Id.* Because the district court denied petitioner relief without

providing an evidentiary hearing, it is necessary (as the Fourth Circuit majority recognized) to accept the truth of petitioner's factual allegations. *See* Pet. App. 4a n.*. Accordingly, the Fourth Circuit decided this case on the purely legal ground that a criminal defendant has no right to override his counsel with respect to tactical decisions at trial, *see* Pet. App. 4-11a, and that legal issue is squarely presented for this Court's review. Indeed, this case presents a good vehicle for reviewing that legal issue precisely because the facts pleaded by petitioner must be assumed to be true, so there is no factual complexity.

It is telling in this regard that the Government does not endorse the explicitly fact-based approach followed by Judge Michael in his concurrence in the judgment below. *See* Pet. App. 12-15a. While Judge Michael correctly rejected the panel majority's "broad" and "ill-advised" legal rule, *id.* at 12a, he incorrectly concluded that petitioner should lose on the specific facts of this case without accepting the truth of petitioner's version of those facts, *see id.* at 14a. The Government cannot, and does not, defend this approach; rather, the most the Government says is that petitioner may lose on factual grounds in "further proceedings on remand." Opp. 20. But the possibility that a litigant may lose on factual grounds in subsequent proceedings provides no basis for this Court to deny review of a legal issue that will determine whether subsequent proceedings are warranted in the first place.

The Government next argues that "even if this Court accepted petitioner's legal contention, and even if his version of the facts prevailed, petitioner would still be required to prove under the second

prong of the *Strickland* test that he was prejudiced." Opp. 20. Again, the Government suggests that this Court's review is unwarranted because of the possibility that "even a favorable decision here" might not "ultimately lead to any meaningful relief" in proceedings on remand. *Id.* And again, that suggestion is meritless: as noted above, the possibility that a litigant may lose on alternative grounds in subsequent proceedings provides no basis for this Court to deny review of a legal issue that will determine whether subsequent proceedings are warranted in the first place.

In any event, the Government's argument is based on a highly selective rendition of the procedural history. As the Government notes, the district court "concluded ... that petitioner suffered no prejudice." Opp. 20 (citing Pet. App. 22a); *see also* Pet. App. 22a ("[Petitioner] has not demonstrated that trial before a different jury would have ended with his acquittal."). What the Government omits is that petitioner expressly challenged that conclusion in the Fourth Circuit. *See* Petr.'s C.A. Br. 28-30 (Section II of petitioner's opening brief: "The Ineffective Assistance Of Counsel Prejudiced Chapman."); Petr.'s C.A. Reply Br. 10-16 (same in petitioner's reply brief).

As petitioner explained in the Fourth Circuit, the prejudice inquiry asks whether "there is a 'reasonable probability' that, absent the alleged deficiency, 'the result of *the proceeding* would have been different.'" Petr.'s C.A. Br. 28 (emphasis added; quoting *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007) (in turn quoting *Strickland*, 466 U.S. at 694)); *see also* Petr.'s C.A. Reply Br. 10 (same). The district

court erred by focusing on whether the result of a *different* proceeding—another trial "before a different jury"—would have been different. Pet. App. 22a. There is no question that the result of *the proceeding in which the ineffective assistance was rendered* would have been different but for the ineffective assistance: if counsel had followed petitioner's instructions, the trial would have ended in a mistrial as opposed to a partial guilty verdict. *See generally United States v. Ramsey*, 323 F. Supp. 2d 27, 38-43 (D.D.C. 2004).

Because the Fourth Circuit concluded that "[t]he district court ... properly rejected [petitioner's] claim that his attorney provided constitutionally ineffective assistance of counsel," Pet. App. 11a, the appellate court did not address the prejudice issue. It is thus misleading for the Government to assert that "[p]etitioner has not challenged [the district court's] conclusion [on prejudice] in *this* Court," Opp. 20 (emphasis added), as if to suggest that petitioner had forfeited that challenge. Petitioner obviously had no reason to challenge the district court's conclusion on prejudice in *this* Court where the Fourth Circuit ruled against petitioner without reaching that issue. If this Court grants review and reverses the decision below, the parties will have ample opportunity to litigate the prejudice issue.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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